SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-232

THE NALLE CLINIC,
Petitioner,

v.

GEORGE P. SCHULTZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 18, 1971.

OPINIONS BELOW

The opinion of the district court, which is unreported, is reproduced in the Appendix to this petition. The opinion of the Court of Appeals is reported at —— F.2d ——, and is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1971, and is reproduced in the Appendix to this petition. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Whether, as the trial court found from the greater weight of the evidence, the defendant Medical Clinic: (1) before the 1966 amendments was not covered under § 3(s) of the Fair Labor Standards Act of 1938, (2) is and at all pertinent times has been a retail or service establishment, and (3), was before the 1966 amendments exempt from the Fair Labor Standards Act of 1938 under the exemption in § 13(a)(2)(i) of the Act?

II. (a) Whether an opinion of the Secretary of Labor published after judgment in the trial court is to be given "considerable and some times decisive weight" in reversing the judgment of the United States District Court?

(b) Whether a private opinion letter of the Wage and Hour Administrator, not addressed to defendant Medical Clinic, written *ex-post facto*, and communicated *post litem motam*, is to be given "considerable and some times decisive weight" in reversing a judgment of the United States District Court?

(c) Does an affirmative answer to II (a) and II (b) above deny defendant Medical Clinic due process in violation of the Fifth Amendment of the Constitution of the United States?

III. Whether the Clinic is "an enterprise engaged in commerce or the production of goods for commerce"?

IV. Whether the "sale of merchandise" test for service establishments adopted in the Court below is to supersede the retail concept analogy adopted in this Court?

CONSTITUTION, STATUTES, RULES

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

29 U.S.C. § 203(b) as amended in 1961 provided:

> "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

29 U.S.C. § 203(i) as amended in 1961 provided:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

29 U.S.C. § 203(j) as amended in 1961 provided:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

29 U.S.C. § 203(r) as amended in 1961 provided:

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities

whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, . . ."

29 U.S.C. § 203(s)(1)(3) as amended in 1961 provided:

"'Enterprise' engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

"(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

". . .

(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;

. . ."

29 U.S.C. § 213(a)(2) as amended in 1961 provided:

"(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—

". . .

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dallor volume of sales of goods or services is made within the State in

which the establishment is located, if such establishment—

"(i) is not in an enterprise described in section 203(s) for this title, or

"(ii) is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or

"(iii) is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or

"(iv) is in such enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

"A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

29 U.S.C. § 258 provides:

"In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to

the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." May 14, 1947, c. 52, § 9, 61 Stat. 88.

5 U.S.C. § 552(a)(1)(D) and (E) provide:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

". . .

"(D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) Except to the extent that a person has actually and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

Rule 52(a), Federal Rules of Civil Procedures, provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to

the opportunity of the trial court to judge of the credibility of the witnesses."

29 CFR 779.317 [first published March 20, 1971]

"Partial list of establishments lacking 'retail concept'

". . .

"Doctors offices."

STATEMENT OF THE CASE

The Secretary of Labor (the "Secretary"), respondent, investigated the Nalle Clinic (the "Clinic"), petitioner, in early 1967. His delegate was extended the courtesy of a private office for his use and the opportunity to interview there everyone he wished to interview and to see all the records he wished to see (Docket Entry No. 13). A year later the Secretary filed his complaint in the United States District Court for the Western District of North Carolina, alleging Federal jurisdiction pursuant to Section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.), hereinafter referred to as the Act. The trial court determined jurisdiction existed under Section 17 of the Act and under 28 U.S.C., § 1337 and § 1345.

The purpose of the Secretary's complaint was to compel the Clinic to comply with the minimum wage and other requirements of the Act as an enterprise covered pursuant to § 3(s)(3) of the Act under the 1961 amendments. The Clinic answered: (a) denying enterprise coverage under the 1961 amendments of the Act, alleging that if it were an enterprise at all under the 1961 amendments, that it was a § 3(s)(1) establishment; (b) denying sufficient involvement in interstate commerce to bring it within the coverage of the Act at the time in question, and (c) alleging that the Secretary's claim was barred pursuant to 29 U.S.C. § 258 in that the Clinic

had acted in good faith in reliance upon and in conformity with the plaintiff's practice and enforcement policy with respect to the class of employees to which the Clinic belonged. The Secretary has apparently made no contention that the Clinic is not meeting the requirements of the 1966 amendments of the Act for newly covered enterprises, which, for a time, are less stringent.

The District Court's Opinion

The trial court heard the evidence without a jury and entered judgment in favor of the Clinic.

The findings of the trial court which are material to the issues in this petition in summary are:

(a) The Clinic is a private medical clinic in the City of Charlotte, Mecklenburg County, North Carolina, employing variously 19 to 27 physicians and surgeons, and also nurses, laboratory technicians, physical therapists, secretaries, clerks, administrative personnel, and janitors and maids. The employment of the janitors and maids was the subject of the complaint filed by the Secretary of Labor.

(b) More than 98% of the income of the Clinic is derived from services supplied for the individual personal needs of patients who are residents of Mecklenburg County or the City of Charlotte, 36 to 40% of this income being derived from medical and surgical services rendered to patients in hospitals by the physicians and surgeons of the Clinic.

(c) Fewer than 10% of the patients of the Clinic have an industrial or employment connection; income from persons of an industrial connection is less than 3% of the Clinic's gross annual income.

(d) None of the services, medicines, drugs, vaccines, bandages and other items provided to patients at the Clinic are intended for resale by the patients.

(e) Most of the doctors at the Clinic belong to the Charlotte Merchants Association and take advantage of the collection services of the Association.

(f) The medical records of patients are maintained and processed by employees of the Clinic, and include billings, processing of insurance claims, and medical data.

(g) The Clinic was not within the enterprise coverage of § 3(s) of the Act by reason of being a retail or service establishment without the required $250,000 "input".

(h) The Clinic is a retail or service establishment under the exception set out in § 13(a)(2) of the Act and was therefore exempt from the coverage of the Act prior to the 1966 amendments.

The Secretary admitted for the purposes of the trial below that at all pertinent times prior to the effective date of the 1966 amendments to the Act, the Clinic did not purchase or receive goods for resale that moved or had moved across state lines which amounted in total annual volume to $250,000 or more; that at least 75 percentum of the Clinic's annual dollar volume of sales of goods or services (or both) was not for resale; and that more than 50 percentum of defendant's annual dollar value of sales of goods or services was made within the State of North Carolina. (R. App. pps. 10-13)

The Court of Appeals' Opinion

The Secretary appealed from the judgment of the District Court. The United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court for the reason that private medical clinics were held to be not retail or service establishments as a matter of law. In reaching this conclusion, referring to its rule that opinion letters of the administrator should be given "considerable and in some cases decisive weight", the Court of Appeals:

(1) Firsh quoted from an unpublished letter of the Administrator dated January 11, 1968, stating the Administrator's opinion that there is no retail concept in the rendition of a doctor's services, saying "although issued only a month before the initiation of the present suit, this letter ought not to be dismissed as merely a self-serving declaration, for it is an *official opinion of national scope*"; [Emphasis added]

(2) Next the Court of Appeals said, "even though promulgated post litem motam, the Administrator's Interpretative Bulletin on the Fair Labor Standards Act as applied to retailers of goods or services should be considered," which "adds 'dentists' offices' and 'doctors' offices' as lacking in retail concept" citing 29 CFR 779.317.

The Court of Appeals also held:

> "Clinic does not appear to us to be 'retail' in the traditional sense. *Applying terms normally attributable to the sale of merchandise to the practice of medicine seems contrary to common usage.* True, Clinic's manager and a past president of the local Medical Society gave their opinion that Clinic could be termed 'retail', and while this evidence is not to be ignored, it is not conclusive. See *Mitchell* v. *City Ice Co.*, 273 F.2d 560, 562 (5th Cir. 1960). Since, to repeat, there was no contest on the facts, this testimony was merely expressions of opinion. On balance, they are clearly outweighed by the ordinary and common place connotation accorded in Laymen's parlance to 'retail'." [Emphasis added]

The position stated by the Administrator in his private letter of January 11, 1968, (Docket Entry No. 11) is one taken subsequent to his letter of June 18, 1964, which clearly evidences a lack of such official position of the Administrator during the relevant period of inquiry here.

REASONS FOR ALLOWANCE OF THE WRIT

"The word 'Clinic' is a generic term which covers a wide variety of group practice arrangements among physicians. It is, therefore, impossible to make any specific determination on the application of the Fair Labor Standards Act to clinics as such. The application of the Act to clinics depends upon the facts in each particular case." Letter of Wage and Hour Administrator, June 18, 1964 (Docket Entry No. 11)

1. The decision of the Court below is inconsistent with this Court's decisions in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 66 S.Ct. 413 (1946); *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 79 S.Ct. 756 (1959); *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 86 S.Ct. 737 (1966), reh. den. 383 U.S. 963, 86 S.Ct. 1219 (1966).

The Clinic's services fell within the plain meaning of retail or service establishment prior to the 1949 amendments to § 13(a)(2) of the Act as that section was construed in *Roland Electrical Co.* v. *Walling*, *supra*. This Court subsequently said that the 1949 amendments were not intended to restrict but rather to expand the definition of retail or service establishment. *Mitchell* v. *Kentucky Finance Co.*, *supra*; *Idaho Sheet Metal Works, Inc.*, *supra*. Section 13(a)(2) prior to the 1949 amendments read as follows:

> "Sec. 13(a). The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employees engaged in any retail or service establishment the greater part of whose selling or servicing is in interstate commerce; . . ."

Roland held that § 13(a)(2) must be "'read in connection with the declared purpose of the Act and in the light of its legislative history . . .", and said at 66 S.Ct., page 418 that the primary purpose of the Act is, "through the exercise of legislative power, to prohibit the ship-

ment of goods in interstate commerce if they are produced under substandard labor conditions." The Court derived some help in determining the purpose of the Act from the original Senate Committee report (Sen. Rep. 884, 75th Cong., 1st Sess. p. 5) which stated:

> "The bill carefully excludes from its scope business in the several States that is of a purely local nature. *It applies only to the industrial and business activities of the Nation* insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce." [Emphasis added]

This Court, construing the phrase "retail or service establishment" in the light of such purpose and legislative history, held:

> "The word 'retail' because of its ready contrast with 'wholesale' is generally more restrictive than the word 'service'. The two, however, are used so closely together in this statute as to require them to be *interpreted similarly.* This makes it appropriate to restrict the broader meaning of 'service' to a meaning comparable to that given the narrower term 'retail'. The words are put on a like level especially by their use in the alternative with the 'establishment' in the phrase 'any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.' *Accordingly, in proportion as the meaning of the word 'retail' is restricted to sales made in small quantities to ultimate consumers to meet personal rather than commercial and industrial uses of those articles, so it is correspondingly appropriate to restrict the word 'service' to services to ultimate users of them for personal rather than commercial purposes.*" [Emphasis added]

Thus is the *Roland* opinion the authoritative source of the "retail concept" as applied to services. Such retail

concept is only an analogy necessitated by the purpose of the Act and not the tradition of retail servicing which the Wage and Hour Administrator insists upon. Thus, when the Court below came to look for a tradition of retail servicing to match against the Clinic's activities, it could find none, and so tried to match the Clinic's activities against those of a retail store, and found them dissimilar. The Clinic has never claimed to be a retail store. It is a service establishment.

This Court in *Roland* was aided in reaching its conclusion by examining the distinction between retail and wholesale in Webster's New International Dictionary, Unabridged (2nd Edition, 1938). Further aid in understanding the import of the retail anology as applied to services can be derived from examining the etymology of the word retail as given in Webster's Third New International Dictionary, Unabridged (1961). The word retail was made by adding the prefix "re" to an old french word "taillier" meaning to cut, and literally means to recut or re-divide. The word was formed to describe the practice of re-dividing large lots of goods into smaller units for sale to the ultimate consumer. The word retail was not traditionally applied to establishments selling only services for the reason that services were not dealt with in this manner. No one has ever heard of a retail barbershop, a retail beauty shop, a retail cemetery, a retail cremetory, a retail dance hall, a retail embalming establishment, a retail funeral home, a retail masseur establishment, a retail public parking lot, a retail public bath, a retail recreational camp, a retail reducing establishment, a retail scalp treatment establishment, or a retail undertaker, yet all of these establishments have been included in the Secretary's list of establishments whose sales or services may be recognized as retail. 29 CFR § 779.320.

This Court's construction of "service establishment" has not since *Roland* been legislatively revised to restrict

its meaning. The 1949 amendments to § 13(a)(2) of the Act added the percentage tests and the "recognition test." This Court in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 79 S.Ct. 756 (1959) construed the 1949 amendments as expanding rather than restricting the definition of service establishment.

The question for the Court in *Kentucky Finance Co.* was whether a loan company was within the exemption. The government contended that the lending of money at interest was not a "sale" even in the retail end of the financial industry. This Court to resolve the issue went into the legislative history:

> "The legislative history of the 1949 amendment to Section 13(a)(2) demonstrates beyond doubt that Congress was acting in implementation of a specific and particularized purpose. Before 1949 the Administrator, in interpreting the term 'retail or service establishment,' then nowhere defined in the statute had, in addition to excluding from the coverage of the exemption personal loan companies and other financial institutions, ruled that a business enterprise generally would not qualify as such an establishment unless 75 per cent of its receipts were derived from the sale of goods or services 'to private persons to satisfy their personal wants,' on the theory that sales for business use were 'nonretail.' This administratively announced 'business use' test was generally approved by this Court in *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 66 S.Ct. 413, 90 L.Ed. 383.
>
> "Congress was dissatisfied with this construction of the statute, and over the objection of the administrator who sought to have his 'business use' test legislatively confirmed, passed the 1949 amendment to § 13(a)(2) to do away with the rule that sales to other than individual consumers could not qualify as retail in deciding whether a particular business enterprise was a 'retail or service establishment,' and

> to substitute a more flexible test, under which selling transactions would qualify as retail if they (1) did not involve 'resale', and (2) were recognized in the particular industry as retail . . . [*I*]*t was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25 per cent of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and were recognized in the field or industry involved as retail.* Thus, enterprises in the financial field, none of which had previously been considered to qualify for the exemption regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in 'retail financing,' remained uneffected by the amendment of § 13(a)(b)." [Emphasis added]

This Court in *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 86 S.Ct. 737 (1966) *reh. den.* 383 U.S. 963, 86 S.Ct. 1219 (1966) reaffirmed the view that the 1949 amendments to the Act did not reduce but expand the category of establishments qualifying for the service establishment exemption. *Ihado Sheet Metal Works, Inc.* further explained the definition of an establishment qualifying for the retail or service establishment exemption as being "one selling goods or services to private individuals for personal or family consumption; sales of these same goods or services to businesses or state agencies remain retail if sold at the normal price charged by the consumers or in quantities a private consumer would buy," and that "plainly the typical retail transaction is one involving goods or services that are frequently acquired for family or personal use." This Court further said, "we reject the industry's usage [the 'recognition' test] as the single touchstone . . ."

The legislative and judicial history of the phrase "retail or service establishment" convincingly demonstrates the

absence of any question about the inclusion of establishments typically and predominantly rendering personal, non-commercial services to the ultimate user. The Clinic's services are almost entirely of this type. There is historically no suggestion that typically personal services are to be excluded from the exemption.

Kentucky Finance Co. identified industries lacking a retail concept on the basis of legislative history as banks, insurance companies, credit companies, newspapers, building and loan associations, telephone companies, telegraph companies, and gas and electric utilities. *Idaho Sheet Metal Works, Inc.* noted those exclusions from the exemption, saying this "demonstrates that not everything the consumer purchases can be a retail sale of goods or services, but the breadth of this qualification need not here be explored." None of the excluded establishments can be viewed as typically "one selling goods or services to private individuals for personal or family consumption," in the words of *Idaho Sheet Metal Work, Inc.*, or as establishments selling typically "in small quantities to ultimate consumers to meet personal rather than commercial and industrial uses", in the words of *Roland Electrical Company.* Utility companies and newspapers provide some customer services, but they are not personal services and they are provided on a mass distribution basis not typical of retail distribution. It is common knowledge that utilities derive a large proportion of their income from industrial and commercial sales, and that newspapers derive a large proportion of their income from industrial and commercial advertising and from sales to distributors. Newspapers are an integral part of the modern mass communication network. Banks and other financing agencies are the very essence of commercialism and have to a material degree been responsible for the modern growth and expansion of commerce and industry. All of these types of organization are as much or more identified with industrial and commercial uses as with personal uses. With reference to

the purpose of the Act, their typical services are directly, extensively and inseparably involved in interstate commerce.

The Court below did not adhere to the rules for construction of the retail or service establishment clause now firmly rooted in this Court's decisions. The Court below purported to take the following three "rules" from *Idaho Sheet Metal Works, Inc.* as controlling rules:

(1) "Not everything the consumer purchases can be a retail sale of goods or services";

(2) "A factor to be weighed was the 'common conception of the term retail' "; and

(3) "That 'the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed' ".

While reason number (1) may be a correct statement, it is manifestly too vague to serve as a standard. Reason number (2) was a comment directed by this Court (86 S.Ct. 737, 748) to sales of tires to fleets of vehicles "at significant discounts and in quantity," and is manifestly not apropos of a service establishment. The Court below compounded this error in holding, "applying terms normally attributable to the sale of merchandise to the practice of medicine seems contrary to common usage." It is also contrary to the directions of this Court in *Roland, Kentucky Finance Co.* and *Idaho Sheet Metal Works, Inc.* Nowhere in the opinion of the Court below are the rules developed in this Court for service establishments considered, applied, or given any weight whatsoever. Reason number (3) above, the scope of the "considerable discretion possessed by the Secretary" is the subject of the second reason for granting the writ discussed below.

The Court below said, "also noteworthy is the Administrator's early ruling that legal, accounting, engineering and *other professional firms* are not 'sufficiently simi-

lar in character to retail establishments to be considered service establishments within the meaning of § 13(a)(2)': Interpretative Bulletin 6, issued December 17, 1938, 1942 Wage and Hour Manual, 334-335. To this classification there have been added medical laboratories and ambulance services as also lacking 'any retail concept'. 29 CFR 779.317." [Emphasis added] Medical laboratories and ambulance services are on the *post litem motam* list which is the subject of the discussion of the second reason for granting the writ, though medical laboratories probably properly belong there in that most are commercial in character in serving doctors as the customers and not the ultimate consumer, the patient. Again, legal, accounting and engineering firms are deeply and inseparably involved in business, industry and interstate commerce, and might properly be said to derive their classification from that involvement. It is dubious what the "other professional firms" are on the excluded list of the Administrator, certainly not doctors' offices or dentists' offices until after the trial in the United States District Court. Nor are chiropractic clinics found there or in 29 CFR 779.317. The Secretary, through his counsel, at trial represented to the Court:

> "Mr. Gerig: Your Honor, we draw the same distinction between chiropractors and doctors as the doctors do, that what the chiropractor does is not professional, that he is not a scientific person, that he is not engaged in a high calling and is not subject to the same restrictions as are doctors." (R. pps. 73, 74; R. App. p. 44)

This position of the Secretary is certainly not sustainable. The General Statutes of North Carolina forbid insurance companies to discriminate between doctors and chiropractors in the payment of medical policy proceeds (G.S. 58-260), require examination of candidates for chiropractic licensing in "nerve tracing, microscopy, histology, anatomy, gynecology, jurisprudence, chemistry, pathology,

hygiene, physiology, embryology, eye, ear, nose, throat, dermatology, symptomatology, and other subjects (G.S. 90-143); and authorize chiropractors to practice in public hospitals and sanitariums (G.S. 90-153). The distinction drawn by the Secretary between chiropractors and medical doctors in the administration of the Fair Labor Standards Act is arbitrary, unreasonable and prejudicial to medical doctors.

No opinion prior to the 1966 amendments to the Act that doctors' offices could not qualify for the exemption has been made known. If a "common concept" is to be involved here, certainly the opinion of the District Court below and of the District Court mentioned in *Juarez* v. *Kennecott Copper Corp.*, 225 F.2d 100 (10th Cir. 1955), ought to count for something. The Secretary himself admits that "the decisions of the courts during the intervening years" are among his sources of information in determining "whether a sale or service is recognized as a retail sale or service." 29 CFR 779.325. The District Court in the *Juarez* case held medical services rendered by doctors in hospitals qualify for the exemption. Following this, The Congress in the 1961 amendments expressly classified medical services rendered in hospitals as qualifying for the retail or service exemption in § 13 (a) (2) (iii) and absolved them from the restriction of the $250,000 input of § 3(s) (1) of the Act. Though the "common conception" of medical clinics as qualifying service establishments now seems to be divided, the weight of record numbers and the earlier and better reasoned authorities are still on the Clinic's side. Such a situation hardly affords the Court below sufficient reason to reverse the District Court as a matter of law.

The secretary manifestly followed none of this Court's rules in adding doctors' offices to his list not qualifying for the exemption. Nor did he follow any other legislative or judicially recognized rules in excluding doctors' offices. Doctors' offices and dentists' offices are now the only es-

tablishments on that list which manifestly typically and primarily furnish personal, noncommercial services to the ultimate consumer for his own use. Thus the Court below gave material weight to the *post litem motam* opinion of the Secretary in reversing the judgment of the District Court, and neither heeded the clear and unequivocal directions of this Court.

The difficulty the Secretary and the Court below had in envisioning the Clinic as a retail or service estabilshment no doubt has its inception in the difficulty of viewing the Clinic as a statutory "enterprise" in the first place. Section 3(r) of the Act requires "a common business purpose" to be an enterprise. The legislative history cited in *Roland* would limit the Act to "the industrial and business activities of the nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden . . . such commerce." Thus, if the Clinic's services are to be excluded from the service establishment exemption by reason of being unlike business activities, the Clinic undoubtedly also does not come under the coverage of the Act as an enterprise in the first instance. The Court below mentioned this problem but made no effort to resolve it.

2. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

The Court of Appeals adhered to its rule of giving "considerable and in some cases decisive weight" to private opinion letters of the Administrator, citing such a letter dated January 11, 1968, one month before institution of this suit and two years following the occurrence of the determinative facts in this case. The reason expressed was that the letter was an "official opinion of national scope." The Court below further gave material weight to the Administrator's Interpretative Bulletin, 29, CFR 779.317, (35 Fed. Reg. 5881, Mar. 20, 1970), adding doc-

tors' offices as lacking in retail concept, "even though promulgated post litem motam."

The foregoing actions of the Court below were in plain violation of the provisions of the Administrative Procedure Act codified in 29 U.S.C. § 552(a)(1)(D), which requires publication in the Federal Register of the Administrator's "statements of general policy or interpretations of general applicability."

The addition of doctors' offices to the Administrator's list of establishments lacking retail concept is manifestly a statement of general policy or interpretation of general applicability. As such, the opinion is required to be published in the Federal Register. This opinion of the Administrator was not formulated until after the determinative facts in this action were established, and not published in the Federal Register as required until after the trial below. In giving material weight to such an opinion, the Court of Appeals denied the Clinic the protection of the provision that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 29 U.S.C. § 552(a)(1).

The Administrator acted arbitrarily and unreasonably in attempting to change the applicable rules after the determinative facts were established or after the conclusion of the trial on the merits. Such official conduct, approved by the Court below, would seem to violate the elementary requirements of notice, hearing and fairness of the Fifth Amendment of the Constitution of the United States. Even children adhere to the basic principle of fairness that one side does not unilaterally change the rules while the contest is in progress.

If the Administrator is to have the power to change the rules after all the facts are in and the trial finished, the impact on potential litigants and trial courts is obvious. Judges do not like to be reversed, and the prospect

of deciding a case against an administrative agency which might then publish opinions in the Federal Register causing his reversal would tempt even the strongest judge to decide for the agency to avoid that risk. Such agency power would manifestly have the effect of substantially chilling resistance to demands of administrative agencies, whether reasonable or unreasonable. This result would aggravate the growing feeling of helplessness on the part of the American public in the face of the bewildering welter of administrative agency rules, decisions, regulations, opinions, practices and procedures, which increasingly regulate the life of the average American and which are formulated by far-away persons not subject to the influence of the ballot box. There is a prevalent and growing tendency on the part of Americans to surrender rights they consider valuable to agency demands they consider unreasonable because "you can't fight city hall." Such a situation bears the seeds of a new police state.

The effect of the decision below, giving "considerable and in some cases decisive weight" to ex post facto opinions of the Administrator has the effect of according tardy agency opinions the force of *stare decisis*.

The Administrator prior to the 1966 amendments to the Act, apparently had no official enforcement policy with respect to private medical clinics, did not communicate any to the Clinic, and did not publish such a policy in the Federal Register. He has in this case attempted retroactive regulation. Such retroactive regulation ought to be held to be forbidden by the due process clause of the Fifth Amendment. It also ought to be held to be forbidden by 29 U.S.C. § 258, which in effect provides that employers are entitled to rely upon "any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged."

This Court in *Roland* noted that service establishments were introduced in the final conference report so that we

lack relevant floor debate. (66 S.Ct. 413, 420). The explanatory debates in Congress therefore are relevant primarily to retail stores, not service establishments. The phrase "service establishment" as used in the Act must stand upon its plain meaning unaided by congressional debate. The retail concept analogy of *Roland* applies with peculiar force to the personal, non-commercial services of the Clinic. If the natural meaning of "service establishment" developed in *Roland* does not apply to the Clinic, then it is only because this legislative standard is so vague that reasonable minds cannot know what it means without an arbitrary decision of the Secretary. Such a result would mean that the lesiglative standard is unconstitutionally vague. Fundamental due process requires that legislative standards be certain enough to give reasonable minds notice of what is commanded or forbidden. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275 (1961).

The effect of the decision of the Court of Appeals below is to deny the Clinic fundamental due process.

3. The decision of the Court below conflicts with the decisions of other courts of appeals on the same matter.

The United States Court of Appeals for the Tenth Circuit in *Juarez* v. *Kennecott Copper Corp.* 225 F.2d 100 (10th Cir. 1955) held that employees of a hospital operated by the Kennecott Copper Corp. in New Mexico "were not engaged in commerce or in the production of goods for commerce", and further were not "so closely related to the production of goods for commerce and so essential thereto as to place them in a 'closely related process or occupation directly essential to the production' of goods for commerce." The facts of the *Juarez* case were:

> "In connection with this operation at Santa Rita, New Mexico, [Kennecott Copper Corp.] has for many years maintained a company-owned and operated hospital located at the rim of its open pit at Santa

Rita. All the plaintiffs, the appellants herein, are presently, or have been in the two years prior to the bringing of this action, employed in various capacities in connection with the operation of the hospital. None of them has been paid the minimum wage required by [the Fair Labor Standards Act of 1938 as amended] for employees covered thereby. The amounts of under-payments and the amounts due them in the event the Act applies to their activities were stipulated and are not in dispute.

"The trial court found that the maintenance of the hospital was a semi-public operation; that caring for patients consisting of the general public and members of mining company employees' families constituted approximately eighty per cent of its operation and that only twenty per cent of its operation consisted in caring for employees; that the operation of the hospital was not an integral part of Kennecott's mining business; that all other mining companies operated in the same are as defendant without maintaining hospitals; that Kennecott for some years has planned to discontinue the operation of its hospital and at the present time has definite plans to discontinue such operation in the near future; that there were ample hospital facilities in the area to care for defendant's employees and the general public, without the maintenance of its hospital at Santa Rita; that there was no interchange of employees between the operation of the hospital and the operation of the mine, mill and smelter; that the chief surgeon and the other doctors on the staff of the hospital are paid a salary by defendant but also engage in independent practice of their profession; that the employment of the plaintiffs at the hospital was employment in a retail or service establishment; that the services rendered at the hospital were rendered entirely within the State of New Mexico and to the ultimate consumer and not for resale; and that less than five per cent of the patients cared for in the hospital came from outside the State of New Mexico."

The *Juarez* case was followed by the United States Court of Appeals for the First Circuit in *Central Aguirre Sugar Co.* v. *Castro*, 330 F.2d 68 (1st Cir. 1964). The First Circuit in *Central Aguirre Sugar Co.* held, "we think that *Juarez* v. *Kennecott Copper Corp.* is indistinguishable on its facts from the case before us, so far as the defendant's hospital is concerned," and reversed the District Court's judgment that the hospital's employees were covered by the Fair Labor Standards Act of 1938 as amended.

Compared to *Juarez* and the *Central Aguirre Sugar Co.* cases the Clinic here is even more completely local and has even less contact with interstate commerce. Less than 3% of the Clinic's annual income has any industrial connection; less than 2% of the income of the Clinic is derived from patients outside of Mecklenburg County; less than 10% of the patients of the Clinic come to the Clinic as a result of any employment connection. From a legal standpoint, the facts which the First Circuit and the Tenth Circuit found controlling in *Juarez* and *Central Aguirre Sugar Co.* are indistinguishable from the facts of this case. The Court below held that the Clinic is a Section 3(s)(3) establishment under the Act which requires that the Clinic have "employees engaged in commerce or in the production of goods for commerce." The decision of the Fourth Circuit in this case presents an irreconcilable conflict with the decisions of the Tenth Circuit and the First Circuit on the question of the construction of the phrase "engaged in commerce or in the production of goods for commerce." Inherent in this conflict are important questions of the extent of the application of the Fair Labor Standards Act to service establishments.

CONCLUSION

For the reasons set forth hereinabove, this petition for certiorari should be granted.

Respectfully submitted,

/s/ Gaston H. Gage
GASTON H. GAGE
1014 Law Building
Charlotte, North Carolina 28202
Attorney for Petitioner

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

Civil Action No. 2322

[Filed, Dec. 31, 1969, U.S. District Court, W. Dist. of N.C., Thos. E. Rhodes, Clerk]

GEORGE P. SHULTZ, Secretary of Labor, United States Department of Labor, PLAINTIFF

vs.

THE NALLE CLINIC, DEFENDANT

MEMORANDUM OPINION AND JUDGMENT

L. H. Silberman, Solicitor of Labor; Beverley R. Worrell, Regional Solicitor, and Carl W. Gerig, Jr., Attorney, United States Department of Labor, Room 339, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309, counsel for George P. Shultz, Secretary of Labor, United States Department of Labor, Plaintiff.

Gaston H. Gage, Grier, Parker, Poe & Thompson, 1014 Law Building, Charlotte, North Carolina 28202, counsel for The Nalle Clinic, Defendant.

Before James B. McMillan, District Judge.

The Secretary of Labor seeks to enjoin The Nalle Clinic, an incorporated medical clinic, from alleged violations of the minimum hourly wage and overtime pay provisions of the Fair Labor Standards Act (29 U.S.C.A., § 201, *et seq.*). The time of the alleged violations begins on February 13, 1966, which is the effective date of certain broadening amendments to the Fair Labor Stand-

ards Act. The defendant in the period beginning February 13, 1966 is admittedly subject to the Act. However, if the defendant was subject to the Act *before* February 13, 1966, its current liabilities since February 13, 1966 are greater than they would be if its liability first began on February 13, 1966.

It therefore becomes necessary to determine whether, *under the law as it existed before February 13, 1966*, the defendant was subject to the Act's requirements.

The first question is whether under the pre-1966 law the defendant was an "enterprise engaged in commerce or in the production of goods for commerce" under 29 U.S.C.A., § 203(s)(1), (3), which read as follows:

> "(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working in goods that have been moved in or produced for commerce by any person:
>
> "(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;
>
> * * * *
>
> "(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;".

A second question is whether the defendant during the relevant period was a "retail or service establishment" exempt under Section 213(a)(2) which in pertinent part read as follows:

> "(a) The provisions of sections 206 and 207 of this title shall not apply with respect to—
>
> * * * *
>
> "(2) any employee by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, if such establishment—
>
> "(i) is not in an enterprise described in section 203(s) of this title."

The court has jurisdiction of the parties and under 29 U.S.C., § 217 and 28 U.S.C., § 1337 and § 1345 it has jurisdiction of the cause of action.

Based upon testimony, pleadings, admissions and other evidence offered at the trial of this case without a jury, the court finds the facts to be as follows:

1. The defendant, The Nalle Clinic, is a private incorporated medical clinic in the City of Charlotte, Mecklenburg County, North Carolina, composed of a medical staff, variously including 19 to 27 physicians and surgeons, working as specialists in cooperative association, duly licensed under the laws of the State of North Carolina primarily for the group practice of medicine by furnishing medical and surgical services for the individual personal needs of citizens, mostly residents, but including some non-residents of North Carolina.

2. The manager of The Nalle Clinic, Ralph Drake, a layman, is generally responsible for the administrative supervision of the Clinic. The defendant employs nurses, secretaries, clerks, receptionists, laboratory technicians,

physical therapists and other personnel including janitors and maids. The employment of the janitors and maids is the subject matter of the complaint filed by the Secretary of Labor. The period involved is the period since February 13, 1966. Plaintiff makes no claims based on alleged violations prior to that date, because of the two-year statute of limitations.

3. Since February 13, 1966, the defendant has each year received annual income from fees for professional medical services in excess of $1,000,000 and as high as $1,800,000. The physicians and surgeons share in the income on a stipulated percentage basis. More than 98% of the income is derived from patients who are residents of Mecklenburg County or the City of Charlotte; 36% to 40% of this income is derived from medical and surgical services rendered to patients in hospitals by the physicians and surgeons or the professional staff.

4. None of the professional services and drugs provided to patients by physicians and surgeons of the defendant are intended for subsequent resale by the patients.

5. The medical staff is organized to provide private specialized medical services, consultation, diagnosis and treatment, through the joint use of equipment and auxiliary personnel.

6. Each member of the medical staff is engaged in the practice of a medical specialty. The general practice is not emphasized and ordinarily occurs only as an incident to practice of a medical specialty.

7. The medical records of patients of the medical staff are maintained and processed by employees of defendant on behalf of the medical staff, and include billings, processing of insurance claims, and medical data. Such medical records are confidential and are considered by the defendant to be protected by the physician-patient privilege against disclosure.

8. At all times pertinent hereto defendant had, at the clinic in Charlotte, a number of employees regularly engaged in ordering, receiving, storing and handling x-ray films, developers, medications, cleaning compounds and other goods which defendant purchases and receives in commerce from points outside the State of North Carolina.

9. The total annual dollar volume of goods during the pertinent period which the defendant bought or received for resale, which goods moved or had moved across State lines (not in deliveries from the reselling establishment) never exceeded $80,000. This dollar volume apparently varied between 8% and 5% of the total dollar volume of the clinic and was nowhere near 50% of the total dollar volume of the clinic.

10. Defendant's exemption from the Act, if it has one, does not come from Section 13(a)(2)(iii), which exempts certain hospitals and other institutions for the care of the sick. The Nalle Clinic is not a hospital within that proviso.

11. Defendant buys most of its medical supplies and pharmaceuticals from McKesson & Robbins, a Charlotte wholesaler. Most of these items are produced outside North Carolina. Medicines, drugs, vaccines, bandages and other items thus purchased are administered to or used in treatment of patients at the clinic.

12. Some patients come to defendant from other States and occasionally drugs, vaccines and blood samples have been mailed across State lines. These activities have occurred as required in the course of providing professional medical services to individual patients.

13. The defendant's administrator, Mr. Drake, expressed the opinion that the defendant is a "retail or service establishment."

14. The defendant does not collect nor remit retail sales taxes.

15. Defendant employed several women as insurance secretaries or clerks. These women regularly sent claims for insurance benefits on behalf of patients to insurance companies, many of which were outside North Carolina, based on data from the patients and from clinic records.

16. Between 90% and 95% of the patients are individuals who attend the clinic as private patients, without any industrial or employment connection. More than 90% of the gross income of the clinic is from medical services rendered by the doctors and staff to private patients. Perhaps one-third of the medical services are rendered to patients in hospitals but are billed from the clinic. There is a department of industrial medicine dealing with industrial health and accident problems, such as workmen's compensation. Income from persons of such industrial connection is less than 3% of the defendant's gross annual income.

17. There is no resale by the patients of the medical services, or of the supplies and drugs dispensed or furnished to the patients.

18. Most of the doctors belong to the Macklenburg County Medical Society, which belongs to the Charlotte Merchants Association. The credit and collection department of the Charlotte Merchants Association operates an aggressive collection service to procure payment of medical bills.

19. The Mecklenburg County Medical Society is affiliated with the North Carolina Medical Society, which is a part of a confederation known as the American Medical Association. Most of the doctors connected with the clinic belong to these societies and associations.

20. The doctors in the defendant clinic are professional men, and their services are professional services; but in operating a clinic, especially one of this size, there are scores of business operations which have to be performed by accountants, secretaries, nurses, janitors, custodians,

shipping and receiving clerks, receptionists, collection departments and other people.

21. The plaintiff's own Interpretative Bulletin (Title 29, Part 779 of the Code of Federal Regulations), Section 779.386, recognizes medical services rendered in hospitals and in clinics and dispensaries operating in hospitals as not lacking in "retail concept." One-third or more of the defendant's income is derived from services rendered to patients in hospitals.

22. The same bulletin lists a set of establishments whose sales or services may be recognized as retail, Title 29, CFR, Part 779, Page 50, § 779.320. This list includes barber shops (the barber or chirurgeon is a forerunner of the modern surgeon), crematories, dance halls, embalming establishments, funeral homes, masseurs, public baths, reducing establishments, scalp-treatment establishments and undertakers. These have a rough similarity to the physical service elements of medical practice, though on a very different level of skill and professionalism.

23. On page 48 of the same bulletin there is a list of establishments considered *not* to be retail. Doctors are missing from this list, although lawyers are listed.

24. Practicing medicine or surgery is the rendering of a service, and each service is a non-transferable retail, not a wholesale, transaction.

Upon these facts, it is the court's opinion that the defendant was not within the "enterprise" coverage of 29 U.S.C.A., § 203(s), because its interstate purchases and sales were less than $80,000 a year and therefore it did not purchase or receive "goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more."

Upon these facts, it is the court's further opinion that The Nalle Clinic is a "retail or service establishment"

under the exception set out in 29 U.S.C.A., § 213(a)(2), and was therefore exempt during the pre-1966 period from the requirements of the Act. *Wirtz* v. *Modern Trashmoval*, 323 F.2d 451 (4th Cir., 1963), *cert. den.* 377 U.S. 925 (1964).

It is argued that the "retail" concept is inconsistent with the "professionalism" of medicine. That may be true, but the same could also be said (with no apologies for any employer, covered or otherwise, who pays less than the statutory minimum wages) for the entire concept of wage and hour regulation of professional people. If the "professional" nature of The Nalle Clinic's services does not keep it from being an "enterprise" under § 203(s), this professionalism should not keep this *service* "enterprise" from being "*retail*" in nature. Moreover, since it is primarily the retail processing of purchases and sales across State lines which brings the case before the court, that retail activity should not be ignored in appraising the overall character of the operation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That before February 13, 1966, the defendant was not covered under 29 U.S.C.A., § 203(s).

2. That the defendant is and at all pertinent times has been a "retail or service establishment."

3. That the defendant was before February 1, 1967, exempt from the Act under the exception in § 213(a)(2)(i) of the Act.

4. That the request for injunction is denied and the action is dismissed.

This the 31st day of December, 1969.

/s/ James B. McMillan
JAMES B. MCMILLAN
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14,645

GEORGE P. SCHULTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Appellant,

v.

THE NALLE CLINIC,
Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

(Argued February 3, 1971 Decided May 18, 1971)

Before Haynsworth, Chief Judge, and Bryan and Winter, Circuit Judges.

Carin Ann Clauss, Attorney, Department of Justice, (Peter G. Nash, Solicitor of Labor, Bessie Margolin, Associate Solicitor, Anastasia T. Dunau, Attorney, Department of Justice, on brief) for Appellant, and Gaston H. Gage (Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

The Secretary of Labor sued to enjoin The Nalle Clinic in Charlotte, North Carolina, from failing to pay the

minimum and overtime wages prescribed in §§ 6 and 7, of the Fair Labor Standards Act of 1938, 29 USC 206 and 207, *before* the amendments effective February 1, 1967. He also asked that the defendant be enjoined from continuing to withhold payment of such compensation owing present and former employees. Added, was a demand for the maintenance of records as directed in §§ 11 (c) and 15(a)(5), 29 USC 211(c) and 215(a)(5).

The Secretary contended that Clinic was an "enterprise" covered by the Act, pointing to § 3(s)(3), 29 USC 203(s)(3). Clinic's plea admitted that during the pertinent period its maids and janitors were not paid in accordance with the requirements of the Act. However, Clinic asserted that it was not embraced in the statute because it had no "business purpose" within the definition of an enterprise under § 3(r), 29 USC 203(r). Further, Clinic argued that even if it were so classified, then it was a "retail or service" enterprise, but still was not covered, because it did not meet a monetary requisite stipulated for such enterprises under § 3(s)(1), 29 USC 203(s)(1). Finally, Clinic argues that as a retail or service enterprise, it would be entirely removed from the application of the Act by § 13(a)(2), 29 USC 213(a)(2).

The District Court held Clinic to be a retail and service establishment, and exempted it from the Act's wages and hours requirement by virtue of the provisions of 13 (a)(2). From the order dismissing his action the Secretary appeals. We find he was entitled to the relief he prayed.

For convenience and a ready understanding of the issues, we quote the relevant sections of the Act, as they existed before February 1, 1967. Section 6(b) directed that every employer pay a specified minimum wage to employees who in any workweek are "employed in an enterprise engaged in [interstate] commerce . . . ." Parallel language in § 7 declared that no employer shall employ any such employees beyond the specified hours un-

less paid extra compensation for the excess time. Section 3(r) defined "enterprise" as "the related activities performed . . . by any person or persons for a common business purpose . . . ." Section 3(s) contained these further pertinent definitions:

> "(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any persons:
>
> "(1) any such enterprise which has one or more *retail or service* establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, . . . and if such enterprise purchases or receives goods for resale that move or have moved across State lines . . . which amount in total annual volume to $250,000 or more;" (Accent added.)
>
> * * * *
>
> "(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;"

The facts are not in dispute and are contained in the following comprehensive findings of the District Judge:

> "1. The defendant, The Nalle Clinic, is a private incorporated medical clinic in the City of Charlotte, Mecklenburg County, North Carolina, composed of a medical staff, variously including 19 to 27 physicians and surgeons, working as specialists in cooperative association, duly licensed under the laws of the State of North Carolina primarily for the group practice of medicine by furnishing medical and surgical services for the individual personal needs of citizens,

mostly residents, but including some nonresidents of North Carolina.

"2. The manager of The Nalle Clinic, Ralph Drake, a layman, is generally responsible for the administrative supervision of the Clinic. The defendant employs nurses, secretaries, clerks, receptionists, laboratory technicians, physical therapists and other personnel including janitors and maids. *The employment of the janitors and maids is the subject matter of the complaint filed by the Secretary of Labor.* The period involved is the period since February 13, 1966. Plaintiff makes no claims based on alleged violations prior to that date, because of the two-year statute of limitations. (Accent added.)

"3. Since February 13, 1966, the defendant has each year received annual income from fees for professional medical services in excess of $1,000,000 and as high as $1,800,000. . . ."

* * * *

"9. The total annual dollar volume of goods during the pertinent period which the defendant bought or received for resale, which goods moved or had moved across State lines (not in deliveries from the reselling establishment) never exceeded $80,000."

* * * *

"Upon these facts, it is the court's further opinion that The Nalle Clinic is a 'retail or service establishment' under the exemption set out in 29 USCA, § 213 (a) (2) . . . ."

Whether Clinic was a "retail or service establishment" is a question of law as there was no dispute on the facts. See U. S. v. General Motors, 384 US 127, 141 n.16 (1965). In our judgment the District Court was wrong in attributing to Clinic a retail concept.

I. The only definition of this terminology in the Act is contained in § 13(a) (2) providing for exemption of certain enterprises of this kind. It says that:

> "A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

While Clinic qualifies as to the other requisites of the definition, it does not qualify as engaged in "retail" pursuits. In discussing the determinants in classifying an operation, the Court in Idaho Metal Works v. Wirtz, 383 US 190, reh. den. 383 US 963 (1966) after noting that "not everything the consumer purchases can be a retail sale of goods or services", at 203, observed that a factor to be weighed was the "common conception of the term retail", at 208, and that "the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed", at 205.

Clinic does not appear to us to be "retail" in the traditional sense. Applying terms normally attributable to the sale of merchandise to the practice of medicine seems contrary to common usage. True, Clinic's manager and a past president of the local medical society gave their opinion that Clinic could be termed "retail", and while this evidence is not to be ignored, it is not conclusive. See Mitchell v. City Ice Co., 273 F2d 560, 562 (5 Cir. 1960). Since, to repeat, there was no contest on the facts, this testimony was merely expressions of opinion. On balance, they are clearly outweighed by the ordinary and commonplace connotation accorded in layman's parlance to "retail".

With respect to the "actual administration of the Act" mentioned in *Idaho Metal Works*, supra, 383 US 963, we have held that an opinion letter of the Administrator, while "not binding on the court" should be given "considerable and in some cases decisive weight". Shultz v. W. R. Hartin & Sons, Inc., 428 F2d 186, 191 (4 Cir. 1970). For this reason we first advert to the opinion of the Ad-

ministrator released January 11, 1968, reading in pertinent part as follows:

> "It is the Division's position that there is no retail concept in the rendition of a doctor's services. The doctor-patient relationship is in no way comparable to the purchase by a customer of goods or services at a retail establishment. The practice of doctors is that of the healing art, not that of retail servicing. There has never been any concept of retail selling or servicing in the practice by doctors of their profession, and it is clear that the exemption provided in section 13(a)(2) was never intended to apply to establishments engaged in providing the professional services of qualified physicians."

Although issued only a month before the initiation of the present suit, this letter ought not to be dismissed as merely a self-serving declaration, for it is an official opinion of national scope. For the same reason, even though promulgated post litem motam, the Administrator's Interpretative Bulletin on The Fair Labor Standards Act as applied to Retailers of Goods or Services should be considered. It adds "dentists' offices" and "doctors' offices" as lacking in retail concept. 29 CFR 779.317.

Also noteworthy is the Administrator's early ruling that legal, accounting, engineering and other professional firms are not "sufficiently similar in character to retail establishments to be considered 'service establishments' within the meaning of Section 13(a)(2)". Interpretative Bulletin No. 6, issued December 17, 1938, 1942 Wage and Hour Manual, 334-335. To this classification there have been added medical laboratories and ambulance services as also lacking any "retail concept". 29 CFR 779.317. While these administrative rulings have alluded to "retail", they have in practice read "service" in the same sense when treating the term "retail or service" enterprise. Guess v. Montague, 140 F2d 500, 503 (4 Cir. 1943).

Thus we conclude that Clinic was not a retail or service establishment. Consequently, it did not fit into the exemption of § 13(a)(2) as the District Court held, for that section exempts only retail or service establishments.

II. The next question is under what provision of the Fair Labor Standards Act, if any, Clinic was subject in compensating its employees. We find it in § 3(s)(3), supra, set out as follows:

> "(3) any establishment of any such enterprise, *except establishments and enterprises referred to in other paragraphs of this subsection*, which has employees engaged in commerce or the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000;" (Accent added.)

Clinic's "sales"—income from the practice of the doctors—exceeded the necessary volume and Clinic can be said to have engaged its employees in interstate commerce as required for coverage. Since § 3(s)(1) pertains to "retail and service establishments", 3(s)(3) must be read to exclude establishments having a "retail concept" because such are referred to in another paragraph of § 3(s). Consequently, Clinic came within the Act's proscriptions and must be required to comply with the minimum wage.

Accordingly, the judgment on appeal is vacated, and the cause remanded for the entry of a decree granting the prayers of the appellant's complaint.

Vacated and remanded.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14,645

GEORGE P. SCHULTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Appellant,

v.

THE NALLE CLINIC,
Appellee.

[Filed Jun 10 1971 Thos. E. Rhodes, Clerk
U.S. District Court, W. Dist. of N.C.]

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for the entry of a decree granting the prayers of the appellant's complaint.

/s/ Samuel W. Phillips
Clerk

[Filed May 18 1971 Samuel W. Phillips, Clerk]

A True Copy, Teste: Samuel W. Phillips, Clerk

By /s/ Illegible
Deputy Clerk

COST FOR THE APPELLEE

Cost of printing appellant's brief	$139.40
Cost of printing appellant's appendix	445.50
Total Costs	$584.90

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No. 71-232

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE NALLE CLINIC, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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THE NALLE CLINIC, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35–41) is reported at 444 F. 2d 17. The opinion of the district court (Pet. App. 27–34) is reported at 307 F. Supp. 1122.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971. The petition for a writ of certiorari was filed on August 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

446-713—71

QUESTION PRESENTED

Whether a medical clinic, engaged in diagnosing and treating human ailments, is a "retail or service establishment" within the meaning of the Fair Labor Standards Act and was therefore not within the Act's coverage under Section 3(s)(3) of the Act, as that Section read from 1961 to 1966.

STATUTE INVOLVED

Sections 3(r), 3(s)(1), 3(s)(3) and 13(a)(2) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201 *et seq.*), as amended in 1961 (P.L. 87–30, 75 Stat. 65, at 66 and 71), are set forth at pages 3–5 of the petition.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioner from violating the Act's recordkeeping provisions (29 U.S.C. 211(c) and 215(a)(5)) and the minimum wage (29 U.S.C. 206(a)) and overtime (29 U.S.C. 207(a)(1)) standards established by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) for employees of enterprises brought within the Act's coverage by the Fair Labor Standards Amendments of 1961. Petitioner admitted that its maids and janitors—the employees in question—were not paid in accordance with the Act's standards (Pet. App. 36), but denied that it was subject to the Act. Claiming that it was a "retail or service establishment" as defined by Section 13(a)(2)

of the Act, petitioner noted that it did not meet one of the tests then prescribed for such establishments by Section 3(s)(1) as a precondition to coverage, in that it did not annually purchase goods originating from outside the State in the amount of $250,000 (*ibid.*). If, on the other hand, petitioner was not a "retail or service establishment," it was subject to the Act under Section 3(s)(3).[1]

Petitioner is a medical clinic which was incorporated by a number of doctors for the group practice of medicine in Charlotte, North Carolina (Pet. App. 29). The clinic's income is derived solely from charges for medical services, and in 1969 its annual gross income was almost $2 million (A. 23–24).[2] The clinic does not collect or remit sales taxes on any of its income, nor is it required to do so under North Carolina's retail sales tax law (A. 24).

The district court dismissed the action, sustaining petitioner's contention that the clinic was a "retail or service establishment," and that it did not meet one of the tests prescribed for the coverage of such establishments by Section 3(s)(1) (Pet. App. 33–34). The court of appeals reversed, holding that the clinic was not engaged in "retail" pursuits within the meaning of Section 13(a)(2) and thus was not a "retail or service establishment" (Pet. App. 39) and that it was, accord-

[1] Section 3(s) was amended in 1966 and no longer refers to a "retail or service establishment." 29 U.S.C. 203(s), 80 Stat. 837.

[2] "A." references are to the appendix filed in the court of appeals.

ingly, subject to the Act under Section 3(s)(3) (Pet. App. 41).

ARGUMENT

The decision below is correct, is consistent with decisions of this Court construing the phrase "retail or service establishment" as used in the Act, and does not conflict with a decision of any other court of appeals. Further review by this Court is thus unwarranted.

1. Under the Act, no concern is a "retail or service establishment" unless the sales or services of that concern meet the retail concept contemplated by Section 13(a)(2). The holding below that medical services rendered by physicians engaged in the group practice of medicine are not "retail" services is consistent with this Court's observations that "not everything the consumer purchases can be a retail sale of goods or services" (*Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 203; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295), and that the term "service establishment" is limited to establishments which "are comparable to the local merchant, corner grocer or filling station operator" (*Roland Co.* v. *Walling*, 326 U.S. 657, 666; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497). The holding below also accords with the long-standing administrative position that such professional firms as "legal firms, accounting firms, [and] engineering firms," although rendering services in the "broad sense" of that term, are not "sufficiently similar in character to retail establishments to be considered 'service estab-

lishments' within the meaning of Section 13(a)(2)" (Interpretative Bulletin No. 6, issued December 17, 1938, 1942 Wage and Hour Manual 334–335, ¶¶ 29–30, and reissued in 29 C.F.R. 779.317). Administrative interpretations of this type, as this Court recognized, "are entitled to great weight" (*Roland Co., supra,* 326 U.S. at 676, 677, n. 10, quoting the same paragraph of Interpretative Bulletin No. 6 set forth above).[3]

Petitioner's contention that every business which renders services to the individual consumer is, for that reason alone, a retail business rests on the erroneous view that Congress, when it amended the Act in 1949, disapproved this Court's entire holding in *Roland, supra.* While, as this Court noted in *Kentucky Finance, supra,* 359 U.S. at 294, Congress expressed dissatisfaction with certain aspects of the *Roland* decision, it not only approved the result reached in *Roland,* but also made clear that the 1949 Amendments were not intended to "change the prior law"

[3] This bulletin, as most recently revised in April 1970, enumerates "dentists' offices" and "doctors' offices" in the "[p]artial list of establishments lacking 'retail concept'" (35 Fed. Reg. 5856). Petitioner objects to this revision while the instant litigation was pending, claiming that it deprives it of due process (Pet. 20–23). The non-retail character of medical clinics, however, had been the subject of several earlier opinion letters by the Administrator, including one issued on June 18, 1964—more than three years before the instant complaint was filed. The June 18, 1964, opinion letter (set forth in pertinent part as an appendix to this brief) addressed itself to the very issue presented here—stating that the coverage of medical clinics should be determined by applying the standards of Section 3(s)(3) rather than those prescribed by Section 3(s)(1). See also Opinion Letter, January 18, 1967, WHM 91:1156e, and Opinion Letter, January 11, 1968, WHM 91:1156kkk.

and that the term "retail or service establishment" did not extend to such businesses as "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc., because there is no concept of retail selling or servicing in these industries" (*Kentucky Finance, supra*, 359 U.S. at 295). As this Court pointed out in *Idaho Metal Works, supra*, "[t]he legislative recital of telephone, gas and electric, and credit companies along with a number of others as businesses outside the [retail or service] exemption * * * demonstrates that not everything the consumer purchases can be a retail sale of goods or services" (383 U.S. at 203).

2. Contrary to petitioner's contention (Pet. 23–25), the decision below does not conflict with the decisions in *Central Aguirre Sugar Co.* v. *Castro*, 330 F. 2d 68 (C.A. 1), and *Juarez* v. *Kennecott Copper Corporation*, 225 F. 2d 100 (C.A. 10). In those two cases, the question was whether certain employees were "closely related and directly essential" to the production of goods for commerce simply because their employers provided hospital care to employees of interstate producers. The courts held that they were not. Coverage in this case, however, turns not on the activities of individual employees, but on petitioner's status as an "enterprise engaged in commerce" as defined in Section 3(s) of the Act. Petitioner concededly meets the threshold requirement of that Section in that it has "employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person * * *" (Pet. App. 31).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor,
BESSIE MARGOLIN,
Associate Solicitor,
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Department of Labor.

OCTOBER 1971.

APPENDIX

Excerpts from the June 18, 1964, opinion letter attached to the Secretary's answer to Defendant's Interrogatories, second set (Docket Entry No. 11):

Mr. JOHN D. STRINGER,
Associate Minority Council,
Committee on Labor and Public Welfare,
United States Senate,
Washington 25, D.C.

DEAR MR. STRINGER: This is in further reference to your letter of May 6, 1964, with which you enclosed excerpts from a letter directed to Senator Barry Goldwater, concerning the application of the Fair Labor Standards Act to employees of a clinic.

* * * * *

The clinic and its operations might constitute an enterprise engaged in commerce or in the production of goods for commerce under section 3(s)(3) of the act. Section 3(r) of the act defines an "enterprise" to mean the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units, including departments of an establishment operated through leasing arrangements. Section 3(s)(3) brings within the coverage of the act any employee employed by any establishment of any such enterprise which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than

$1,000,000. It seems clear that the association with which we are here concerned is performing activities through unified operation or common control for a common business purpose. If the clinic has employees who are regularly engaged in commerce or in the production of goods for commerce so as to meet the requirements of coverage on an individual basis as explained above, and if the requisite $1,000,000 volume of sales or business is met, enterprise coverage under section 3(s)(3) would extend to all employees, not otherwise covered on the traditional individual basis, unless specifically exempt.

* * * * *

Sincerely yours,

CLARENCE T. LUNDQUIST,
Administrator.

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v.

JAMES D. HODGSON, SECRETARY OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The Respondent's Brief in Opposition directs no argument to Petitioner's grounds for review that the opinion below is judicially bad and damaging precedent in denying petitioner rights under the Fifth Amendment of the United States Constitution and under the Administrative Procedure Act. However, respondent's brief does raise novel arguments which deserve reply.

1. Respondent argues (Br. in Opp. 5) petitioner's position depends upon the "erroneous view" that Congress in 1949 "disapproved this Court's entire holding in *Roland, supra.*" On the contrary, petitioner argued (Pet. 12-15) that the retail concept analogy, which is clearly stated as the rule for service establishments in

Roland Electrical Company v. *Walling*, 326 U.S. 657, 675 (1946), is still valid precedent and has been reaffirmed in *Mitchell* v. *Kentucky Finance Company*, 359 U.S. 290 (1959) and *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190 (1966), *reh. den.* 383 U.S. 963 (1966).

The thing overruled by Congress in 1949 (in favor of a more flexible, inclusive test) was the restrictive nature of the Administrator's "business use test." See *Mitchell* v. *Kentucky Finance Corp.*, *supra*, at p. 293. The substitution of a more inclusive test for the business use test was immaterial to the status of petitioner, since petitioner qualified as a retail or service establishment both under the business use test and under the subsequent more inclusive test. The Administrator's business use test held that an enterprise would not qualify as a retail or service establishment unless 75% of its sales of goods or services were to private persons to satisfy personal wants. See Interpretative Bull. No. 6, 1942 WH Manual 326, Pars. 14, 18. This Court in *Roland* did not adopt the Administrator's statement of his business use test, but did reason at page 667:

> "It is rare, if not impossible, for an employee who is engaged in an occupation necessary to the production of goods for interstate commerce to be said to be at the same time an employee engaged in a retail or service establishment whose selling and servicing is confined to ultimate consumers. *These employments are largely mutually exclusive.* To the extent that sales or services are necessary for the production of goods for interstate commerce they generally are by that hypothesis *not sales or services to an ultimate consumer for his personal use* and, accordingly, are *neither 'retail' sales nor services of a comparable character*, within the meaning of § 13(a)(2). [Emphasis added]
>
> *"The logic of this result is as clear as the declared purpose, legislative history and administra-*

tive practice which combine to produce it." [Emphasis added]

Still valid is this Court's reasoning in *Roland* that services rendered to the private consumer for his personal use are far removed from the purpose of the Fair Labor Standards Act, even though such services may occasionally involve handling something that has moved in interstate commerce. The holdings of the *Juarez* and *Central Aguirre* cases, discussed below, comport completely with such reasoning.

It has not been argued that the retail concept analogy has been overruled or restricted by this court or by Congress. One action of the court below which petitioner asserts as prejudicial error is the rejection of this Court's retail concept analogy in favor of a new, highly restrictive "sale of merchandise" test for service establishments. (Pet. 17). The Fourth Circuit's novel sale of merchandise test is substantially prejudicial to service establishments and directly contrary to the purpose of the Fair Labor Standards Act.

2. Respondent contends (Br. in Opp. 6) "the decision below does not conflict with the decisions in *Central Aguirre Sugar Co.* v. *Castro*, 330 F.2d 68 (C.A. 1) and *Juarez* v. *Kennecott Copper Corp.*, 225 F.2d 100 (C.A. 10)" for the reason that the issues are different, i.e., coverage in this case does not depend, as in those two cases, upon employees being engaged in commerce or in the production of goods for commerce, but only upon the "threshold requirement" of 29 U.S.C. § 203(S) that petitioner have "employees handling, selling or otherwise working on goods that have been moved in or produced in commerce . . ." A simple reading of 29 U.S.C. § 203 (S) (3) will dispel respondent's mistaken impression. This paragraph says, "(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, *which has employees engaged in commerce or in the production*

of goods for commerce . . ." [Emphasis added]. Thus, paragraph (3) of this subsection (which the court below held applicable in this case) is different from the other paragraphs of the same subsection in expressly adding the requirement emphasized above. *Juarez* and *Central Aguirre* expressly held that the employees of the respective hospitals were not engaged in commerce or in the production of goods for commerce. The two cases are thus in direct and irreconcilable conflict with the decision below on this issue. This issue in the three cases is the same. The Tenth Circuit in *Juarez* held as to the forty-six hospital employees named as parties, "It is clear that appellants are not directly engaged in commerce or in work for the production, processing or sales of goods in commerce." 225 F.2d 100, 102. The First Circuit in *Central Aguirre* said, "We think that *Juarez* v. *Kennecott Copper Corporation* is indistinguishable on its facts from the case before us, so far as the defendant's hospital is concerned." 330 F.2d 68, 72.

The other arguments presented in respondent's opposition brief are answered in the Petition. Petitioner respectfully submits that there is no justification for this Court delaying resolution of the highly important questions of law unsettled by the decision of the court below.

Respectfully submitted,

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